



## Client Alert November 2023 The New Regime of Public-Private Partnership

*On 29 September 2023, Indonesia's Ministry of National Development Planning/National Development Planning Agency (Bappenas) enacted Bappenas Regulation No. 7 of 2023 on the Implementation of Public Private Partnership in Infrastructure Provision ("**Bappenas Regulation No. 7/2023**") which revokes the previous regulation, i.e.: Bappenas Regulation No. 4 of 2015 on the Implementation Procedure on Public Private Partnership in Infrastructure Provision as amended by Bappenas Regulation No. 2 of 2020 ("**Bappenas Regulation No. 4/2015**"). The enactment of this new regulation was initiated to simplify the PPP process in Indonesia and to provide a regulation that delivers more certainty in PPP implementation. This new regulation is expected to increase private sector contributions to infrastructure provision, in order to optimize financing as mandated by RPJMN 2020-2024, which will contribute to the optimization of Public-Private Partnerships ("PPP") for the benefit of the public interest.*

### Overview

The Bappenas Regulation No. 7/2023 contains several provisions that are new for the PPP Implementation and are not regulated in the previous regulation, those include the small-scale PPP, additional sector and sub-infrastructure, PPP procedure simplification, utilization of existing project company, etc. Those new provisions are included in the newly enacted Bappenas Regulation No. 7/2023 which contains 8 chapters (General Provision, Infrastructure Type, PPP Organizer, Implementation Procedure on PPP, Small-Scale PPP, Shifting on PPP Initiatives, Transitional Provision, Concluding Provision) and 2 appendixes ((i) PPP Implementation Phase, Small-Scale PPP, Shifting on PPP Initiatives, PPP Indicative Timeline and (ii) Preliminary Study Guidelines, Pre-feasibility Study Guidelines, and Value for Money Assessment).

## Key Observations

With the issuance of the new regulation, below are some of the significant changes to be considered in the PPP implementation in Indonesia.

	Bappenas Regulation No. 4/2015	Bappenas Regulation No. 7/2023
<b>PPP Procedure Simplification</b>	<p>PPP stages consist of:</p> <ol style="list-style-type: none"> <li>Planning;</li> <li>Preparation;</li> <li>Transaction; and</li> <li>The execution of the PPP agreement.</li> </ol> <p>The study's focus in the planning and preparation stage consists of broader objects to be elaborated.</p>	<p>PPP stages consist of:</p> <ol style="list-style-type: none"> <li>Planning;</li> <li>Preparation;</li> <li>Transaction; and</li> <li>PPP management.</li> </ol> <p>The study's focus in the planning and preparation stage is more simplified than in previous regulations. Nonetheless, the material is still similar in concept.</p>
<b>PPP Organization</b>	<p>Under this regulation, the organization of PPP consists of 4 Units, among others:</p> <ol style="list-style-type: none"> <li>PPP node whose role is to prepare policy, synchronization, coordination, supervision, and evaluation of the PPP Project as well as assist the GCA in the implementation of the PPP Agreement;</li> <li>PPP team whose role is to manage the PPP project from the preparation stage until financial close;</li> <li>Procurement Committee whose role is to be responsible for the procurement process; and</li> <li>PPP controlling team whose role is to conduct the execution of the PPP agreement stage.</li> </ol>	<p>Under this new regime, only the PPP node and Procurement Committee still exist, in which the PPP Node takes the responsibility for assisting GCA in conducting all PPP stages, starting from the planning stage until the PPP management stage.</p>
<b>Additional Infrastructure Sector</b>	<p>Stipulates 20 infrastructure sectors that can be cooperated with the PPP scheme.</p>	<p>Stipulates 22 infrastructure sectors that can be cooperated with the PPP scheme, which the additional of infrastructure sector are:</p> <ol style="list-style-type: none"> <li>Industrial ecosystem infrastructure; and</li> <li>Battery-based electrical vehicle infrastructure.</li> </ol>
<b>Return on Investment</b>	<p>No clearly stated regarding the combination of user charge and Availability Payment.</p>	<p>The return on investment can be conducted with the combination of:</p> <ol style="list-style-type: none"> <li>User charge;</li> <li>Availability Payment; and/or</li> <li>Other forms as long as do not contravene the prevailing regulations.</li> </ol>
<b>Utilization of Existing Implementing Business Entity ("IBE")</b>	<p>N/A</p>	<p>The procurement winner can set the Limited Liability Company ("<b>Company</b>"), which was established before the procurement process started, and act as an IBE. This provision also applies to small-scale PPP.</p> <p>The type of existing Company that can be used as IBE:</p> <ol style="list-style-type: none"> <li>The Company that is the winner of the procurement process;</li> </ol>

		<ul style="list-style-type: none"> <li>b. The Company which is the member consortium of the winner of the procurement process; or</li> <li>c. The Company is affiliated with the winner of the procurement process.</li> </ul>
<b>Small-Scale PPP</b>	N/A	<p>Small-scale PPP can be defined as a PPP project with a simple scope, using proven technology, and does not need a Viability Gap Fund. For regional government projects, the cooperation period shall be less than 10 years.</p> <p>The small-scale PPP project can be conducted under the following provisions:</p> <ul style="list-style-type: none"> <li>a. The return on investment prioritized using user charge;</li> <li>b. Project company procurement conducted through (i) one-stage tender; (ii) the combination of pre-qualification and one-stage tender; or (iii) direct appointment;</li> <li>c. the IBE can be used from the Company which has been established prior to the procurement process.</li> </ul>
<b>Delegation of Authority</b>	Delegation of authority can be carried out in accordance with the applicable provisions within GCA and there is no specific regulation on the limitation of authority that can be delegated.	<p>The limitation of authority that cannot be delegated to conduct PPP project:</p> <ul style="list-style-type: none"> <li>a. Minister/Head of Institution as GCA: delegation does not include the authority to sign a regress agreement;</li> <li>b. Regional Head as GCA: Delegation of authority does not include: (i) signing PPP agreement; (ii) signing of regress agreements; and/or (iii) signing other agreements that are the responsibility of the Regional Government Head.</li> </ul>
<b>Amendment of PPP Agreement</b>	There is no provision that contains a provision that must be maintained in the event of an amendment to the PPP agreement.	<p>The amendment to the PPP agreement clauses can be made based on the consensus between GCA and the IBE as long as:</p> <ul style="list-style-type: none"> <li>a. does not change project structure;</li> <li>b. does not change the financial viability of the project;</li> <li>c. does not change risk allocation;</li> <li>d. does not change bidding parameters;</li> <li>e. does not reduce the service;</li> <li>f. does not increase government obligations under the PPP agreement.</li> </ul>
<b>Financial Close</b>	The financial close period can be extended from time to time by GCA if the failure of financial close is not caused by project company negligence.	The financial close must be achieved no later than 12 (twelve) months from the date of signing of the PPP agreement and can be extended two (2) times with an extension of six (6) months respectively.
<b>Probity Advisor</b>	N/A	<p>The role of probity advisor, among others:</p> <ul style="list-style-type: none"> <li>a. The probity advisor has the task of providing recommendations to GCA regarding the suitability of the PPP project process starting from project company procurement until financial close. If necessary, a probity advisor can be involved by GCA during the PPP preparation stage.</li> </ul>

		b. The probity advisor can be business entities, individuals, and/or the government's internal supervisory apparatus (APIP).
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## Transitional Provision

### The Impact of Regulation Changes on Ongoing Projects

The Government Contracting Agency (“GCA”) that carries out the PPP stage before the enactment of Bappenas Regulation No. 7/2023 shall finish the ongoing stage and fulfill the PPP mandatory documents under Bappenas Regulation No. 4/2015. To continue to the next stage, the GCA shall conduct PPP stages which are regulated under Bappenas Regulation No. 7/2023. If there is a requirement to continue to the next stage, the GCA shall fulfill the requirement based on the provision under Bappenas Regulation No. 7/2023.

As of the enactment of the Bappenas Regulation No. 7/2023, it is important for all the stakeholders to give attention to how the implementation of this regulation impacts to the ongoing PPP project. In order to give clarity on when this regulation shall apply to the ongoing PPP projects, this regulation sets out the transitional provision, which consists of at least 4 (four) conditions, as follows:

No.	Condition	Transitional Provisions
1.	<b>PPP Stages</b>	<ul style="list-style-type: none"> <li>a. GCA implementing the PPP stage before the enactment of the Bappenas Regulation No. 7/2023 shall complete the stages and fulfil the completeness of PPP documents in accordance with the provisions of the Bappenas Regulation No. 4/2015;</li> <li>b. To continue to the next stage, GCA carries out the PPP stage in accordance with the provisions of the Bappenas Regulation No. 7/2023; and</li> <li>c. If there are requirements for the next stage, GCA shall fulfil the requirements in accordance with the provisions of the Bappenas Regulation No. 7/2023.</li> </ul>
2.	<b>PPP Institution</b>	PPP institutions that have been formed and/or appointed remain valid but shall adjust their duties and institutional structure according to the Bappenas Regulation No. 7/2023.
3.	<b>PPP organized by Regional-Owned Enterprise (“ROE”)</b>	<ul style="list-style-type: none"> <li>a. The PPP Agreement that has been signed by the directors of ROE remains valid;</li> <li>b. For the PPP Projects that are in the transaction stage, the completion of the PPP stages may refer to the Bappenas Regulation No. 4/2015; and</li> <li>c. For the PPP Projects that have not yet entered the transaction stage, the completion of the PPP stages refers to the Bappenas Regulation No. 4/2015 with the assignment from the Head of Region and continuing the next stage in accordance with Bappenas Regulation No. 7/2023.</li> </ul>
4.	<b>Shifting on PPP Initiatives</b>	Any process of shifting the PPP initiatives may be continued in accordance with the provisions in the Bappenas Regulation No. 7/2023.

Besides the transitional provision, The Bappenas Regulation No. 7/2023 also regulates several provisions that will be regulated under the National Public Procurement Agency Regulation (“**LKPP Regulation**”), including (a) Procurement committee; (b) Probity advisor; (c) Preparation Agency procurement; (d) Proof of supporting activities that are being/have been carried out as a condition for starting the transaction stage; (e) Procurement of project company; (f) Follow-up of termination of PPP Agreement due to failure of financial close; (g) Supporting documents on feasibility study for unsolicited PPP; (h) Follow-up on compensation to the project initiator (for unsolicited PPP project); (i) Small-scale PPP procurement; and (j) Termination of project company

procurement during the transition of transaction stage PPP. Until now, we still waiting for the implementation of the said provision under LKPP Regulation.

## Key Takeaways

1. The GCA that carries out the PPP stage before the enactment of Bappenas Regulation No. 7/2023 shall continue the ongoing stage and fulfill the PPP mandatory documents under Bappenas Regulation No. 4/2015. To continue to the next stage, the GCA shall conduct PPP stages in accordance with Bappenas Regulation No. 7/2023.
2. The enactment of Bappenas Regulation No. 7/2023 has resulted in several additions and changes to the previous regulation. It also simplifies the whole process of PPP by simplifying (a) the preparation of study documents; (b) opening the procurement options (combining two stages at a time); (c) the combination of return on investment; and (d) simplifying the PPP stakeholders.
3. The implementation of this new regime is expected can make a significant impact in luring domestic or international investors to use the PPP scheme to develop the infrastructure in Indonesia with more structured and assertive provisions than previous regulations. However, please note that we still waiting for the other supporting regulations such as LKPP regulation and/or other sectoral regulations to fully implement this new regime.

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